

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. OSAB 2001-18
)	(On Remand)
DIRECTOR, DEPARTMENT OF LABOR)	
AND INDUSTRIAL RELATIONS,)	ORDER NO. 99
)	
Complainant,)	ADDITIONAL FINDINGS OF FACT ON
)	REMAND
vs.)	
)	
MARYL PACIFIC CONSTRUCTORS, INC.,)	
)	
Respondent.)	

ADDITIONAL FINDINGS OF FACT ON REMAND

On February 20, 2003, the Second Circuit Court, Honorable Joel E. August presiding, issued an Order Remanding Case for Additional Findings of Fact in Civil No. 02-1-0402(1), an appeal from the Labor and Industrial Relations Board's (LIRAB) Order Adopting Proposed Findings of Fact, Conclusions of Law, and Order, dated July 26, 2002 of the Hawaii Labor Relations Board (Board) issued on June 13, 2002. The Court ordered LIRAB to:

make additional findings of fact on what enforcement or monitoring Maryl did, if any, after its consult with Dawn Tanaka ended on July 25, 2000 to January 23, 2001, when HIOSH inspected its worksite. The Board may make the additional factual findings with or without a new hearing or trial, which the Court is not ordering the Board to conduct.

Pursuant to the Court's order, this Board held a status conference with the parties on March 6, 2003 and set deadlines for the parties to submit proposed findings to the Board. On March 27, 2003, Respondent MARYL PACIFIC CONSTRUCTORS, INC. (MARYL) filed Proposed Findings of Fact on Remand. Thereafter, Complainant DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (DIRECTOR) filed objections to MARYL's Proposed Findings on April 10, 2003 and MARYL filed a Reply on April 17, 2003. The DIRECTOR filed objections to MARYL's Reply on April 28, 2003.

After consideration of the record before the Board and the submissions of the parties, the Board¹ makes the following additional findings of fact to be inserted on page 4 of its Proposed Decision between paragraphs 16 and 17.

ADDITIONAL FINDINGS OF FACT

- 16a. Relying on Tanaka's advice, Respondent painted a bright orange caution line near the edge of the roofs and set up controlled access zones marked by signs and construction tapes where Bluewater's sheathing work would occur. Deposition of Eric Biely dated November 6, 2001 (Biely Deposition), at pp. 64-65, 71-76.
- 16b. Respondent adopted a daily inspection procedure to abate the perceived hazards noticed on Tanaka's site visits. Biely Deposition, at pp. 79-81.
- 16c. Respondent used safety monitors wearing orange vests who watched workers on nearby elevated surfaces. A photograph taken by HIOSH Safety Compliance Officer Clark on January 23, 2001 depicted one of the safety monitors working on the job site. Biely Deposition, at pp. 95-98.
- 16d. The safety monitor photographed by Clark was wearing an orange vest over a white shirt, standing on the ground, and looking up at two workers on a nearby roof. Transcript of the Hearing on January 25, 2002 (Tr.), at pp. 216-18.
- 16e. Safety monitors were used solely for roof shingling work. Tr. at p. 251.
- 16f. Based on discussions with Tanaka and the Subcontractors, Respondent decided to use alternative fall protection methods such as safety monitors, painted caution lines, and controlled access zones after deciding that personal fall arrest systems (ropes and harnesses) would constitute serious tripping hazards on roofs and being encumbered by lanyards would be dangerous. Biely Deposition, at pp. 66-68, 106-11.
- 16g. To make sure that all the job site workers followed the safety requirements established by Tanaka and Respondent, Respondent had the authority to punish safety violations (including firing any employee of the Subcontractors) and conducted weekly safety training meetings with the Subcontractors. Biely Deposition, at p. 52; Tr. at pp. 236-37, 267-70, 274-76.

¹In 2002, Hawaii Revised Statutes (HRS) § 396-3 was amended to give the Board jurisdiction over HIOSH contests under HRS § 396-11. See 2002 Session Laws of Hawaii, Act 104, § 1. Thus the Board, rather than LIRAB, issues the instant Findings of Fact in this remand.

- 16h. Respondent specifically instructed Bluewater to keep an updated list of workers on the job site so that Respondent would know which workers were available and their qualifications to do roof work. Tr. at pp. 269-70.
- 16i. Respondent reasonably relied on the Subcontractors to comply with these safety procedures.
- 16j. Following Tanaka's consultation in July 2000, Respondent continued to conduct weekly safety meetings with the Subcontractors to address the safety concerns raised by Tanaka and to ensure that her training instructions were followed. These meetings continued after Clark's inspection in January 2001. Tr. at pp. 274-75. Respondent's Response to Complainant Director, Department of Labor and Industrial Relations' First Request for Production of Documents filed August 3, 2001 provided copies of Respondent's Weekly Safety Meeting, Weekly Safety Job Safety Inspection, Toolbox Meeting, and Weekly Toolbox Safety Meeting reports.
- 16k. Respondent's Response to Complainant Director, Department of Labor and Industrial Relations' First Request for Answers to Interrogatories filed August 3, 2001, at 3-4, ¶¶ 5-6 listed the training and documents describing the fall protection safety measures implemented at the job site as of Clark's January 23, 2001 inspection.
- 16l. The Board credits Respondent's Responses and finds that Respondent engaged in extensive safety enforcement and monitoring efforts.
- 16m. Following Tanaka's consultation, Respondent submitted to HIOSH documentation establishing compliance with her safety recommendations to correct hazards on the job site. Deposition of Peter Anderson dated November 6, 2001 pp. 36-37.
- 16n. On October 6, 2000, Respondent sent by facsimile transmission documentation and photographs to Tanaka to prove the abatement of the safety hazards discussed in her consultations. Tr. at 58-59.
- 16o. After receiving Respondent's documents, Tanaka contacted Respondent regarding the sufficiency of the abatement. After speaking with Respondent's representatives, Tanaka was satisfied that adequate fall protection measures were taken. Tr. at pp. 82-84.
- 16p. The Board finds that evidence in the record establishes that Respondent exercised reasonable diligence in enforcement and monitoring done during the period between Tanaka's July 25, 2000 consultation and the January 23, 2001

HIOSH inspection by Clark. The Board credits Respondent's Responses and the testimony of Biely and Anderson.

- 16q. The Board further finds that Complainant has not presented evidence to dispute that Respondent engaged in diligent enforcement and safety monitoring for this period, as documented in Respondent's Responses and the testimony of Biely and Anderson.

ORDER


The above additional Findings of Fact are hereby incorporated into the Proposed Decision.

DATED: Honolulu, Hawaii, June 2, 2004.

HAWAII LABOR RELATIONS BOARD


BRIAN K. NAKAMURA, Chair


CHESTER C. KUNITAKE, Member


KATHLEEN RACUYA-MARKRICH, Member

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